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OCTOBER TERM, 1956

No. 403

HENRY RAGONTON RABANG, *Petitioner*

vs.

P. BOYD, District Director, Immigration and Naturalization Service, *Respondent*.

RIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the Court of Appeals (R. 46-48) is reported at 234 F.2d 904.

JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 1956 (R. 49). The petition for a writ of certiorari was filed September 10, 1956, and was granted November 13, 1956 (R. 49). The jurisdiction of this court rests on 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether a Filipino who was born a United States national and who has resided continuously in the continental United States since he came here as a national in 1930, may be deported as an alien for conviction of an offense involving narcotics?

STATUTES INVOLVED

The statutes involved are: The Act of February 18, 1931, as amended, 46 Stat. 1171, former 8 U.S.C. 156a; sections 19 and 20 of the Act of February 5, 1917, as amended, 39 Stat. 889, former 8 U.S.C. 155 and 156; and sections 2 (a) and 8 (a) and (d) of the Philippine Independence Act of March 24, 1934, as amended, 48 Stat. 456, former 48 U.S.C. 1232, 1238 and 1244. These provisions, some of which are lengthy, are set forth in the appendix, Brief, pp. 25 to 31.

STATEMENT

Petitioner was born in the Philippine Islands in 1910 (R. 19). He came to the continental United States as a national in 1930 and has never left the United States since then (R. 19). On February 12, 1951, he was convicted of an offense involving narcotics, a violation of section 2554 (a), Title 26, U.S.C. He was given a six-month sentence, which was suspended, and he was placed upon probation for three years (R. 39-40).[1]

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[1]The comparative triviality of petitioner's offense is shown by the sentence of the court. The following letter of petitioner's counsel was included in the administrative file:

> ". . . Mr. Rabang came into possession of the five Morphine Tartrate Syrettes very casually with absolutely no criminal intent whatsoever, and without any understanding that he was doing wrong. He held the Syrettes for approximately one year and passed them on, on the representation that the party to whom he was giving them was sick and needed some medication. The sale part was entirely immaterial and he was given only a couple of dollars at the time. The purchaser sought him out on many occasions to complete the transaction and also attempting to ascertain whether or not Rabang had any source of supply. Rabang, of course, had none and so informed the purchaser. . . . [W]hen he was taken into custody he made a full disclosure of the whole matter. . . . [I]t became apparent to the United States Attorney's office that the case was very weak and furthermore that the only possible witness to the transaction had left the country and would be unavailable for any trial. The United States Attorney's

On March 21, 1951, petitioner was arrested on a warrant charging that he was an alien who had been convicted of violation of law involving narcotics, deportable under the Act of February 18, 1931, as amended, former 8 U.S.C. 156a (R. 34, 35). After an administrative hearing at which the foregoing matters relating to his birth, his coming to the United States, his marriage to a United States citizen wife, who was dependent upon him (R. 24, 25), and his conviction, and at which he claimed United States nationality (R. 19), he was ordered deported on the warrant charge (R. 7, 33). His deportation was held in abeyance pending the adjudication of the deportability of Filipinos who entered prior to the Philippine Independence Act of March 24, 1934, in *Mangaoang v. Boyd* (C.A. 9, 1953) 205 F.2d. 553, and *Barber v. Gonzales*, 347 U.S. 637.

On March 1, 1955, the Acting Regional Commissioner moved the Board of Immigration Appeals to reopen the case "with a view of terminating the proceeding or for such other action as it deems appropriate." The motion was filed "in view of the decision of the United States Supreme Court in the case of *Barber v. Gonzales* . . . " (R. 11). On April 7, 1955, the Board denied the motion on the ground that *Barber v. Gonzales* was inapplicable. The decision states:

" . . . the alien involved is a native and citizen of

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office at this point had received the requested instructions to dismiss the case, but Rabang, feeling that he had done something wrong, insisted that he should not take advantage of this situation and he entered a plea of guilty in order to do what he thought would clear his record." (R. 35, 36)

There is nothing on the record to indicate why the district court was not requested to recommend against deportation. It seems likely that petitioner did not believe at the time that he was an alien subject to deportation (*cf.* R. 19).

the Philippine Islands, and he also came to the United States in 1930 at a time when he was a national of the United States, as did Gonzales. Here, however, the alien has been ordered deported under the Act of February 18, 1931. That Act does not set up entry as an alien as an essential element to deportability. All it requires is that the person sought to be deported be an alien and that he be, or have been, convicted for violation of any law regulating traffic in narcotics after the effective date of the enactment. On this record, the person sought to be deported was convicted 20 years after the enactment of the legislation under which he is sought to be deported, and he was an alien at the time of such conviction, having been an alien for all purposes since July 4, 1946." (R. 10)

Petitioner alleged in a petition for habeas corpus, for declaratory relief, and for review of administrative proceedings in the District Court, that he, never having voluntarily relinquished his nationality, and never having entered the United States, was not an alien subject to deportation (R. 1-5). The District Court denied his petition (R. 41-43), and the Court of Appeals affirmed (R. 46-48), on the grounds stated by the Board of Immigration Appeals in denying the Acting Regional Commissioner's motion to reconsider. Apparently neither the Board, the District Court, nor the Court of Appeals considered the relationship of sections 19 and 20 of the Act of February 5, 1917, former 8 U.S.C. 155 and 156, to the Act of February 18, 1931, former 8 U.S.C. 156a.

ARGUMENT

Summary

1. The Act of February 18, 1931 (former 8 U.S.C. 156a) provides for the deportation of aliens convicted of narcotics offenses "in the manner provided in sections 19 and 20 of the Act of February 5, 1917 (former 8 U.S.C. 155 (a) and 156). The two sections referred to each make "entry" in the sense of "an alien coming into the United States from a foreign place country" a precondition of deportability. *Barber v. Gonzales*, 347 U.S. 637. It appears to have been the intent of Congress in passing the 1931 Act to add alien narcotics violators to the classes of deportable aliens enumerated in section 19, and hence to make the general provisions of that section, and section 20, including the term "entry," applicable to the 1931 Act.

Barber decided that a Filipino who came to the United States as a national in 1930 was not deportable since he did not "enter" as that term is used in section 19 of the 1917 Immigration Act. Petitioner, a Filipino, was also a national when he arrived in the United States in 1930. He did not enter, and hence is not deportable under sections 19 and 20, which are made a part of the 1931 statute.

Even if it were to be decided that "entry" is not made a precondition to deportation by the reference to sections 19 and 20 in the 1931 Act, entry is an implied condition, since the power to expel aliens arises from the implied constitutional power to exclude and conditionally admit the subjects of foreign sovereignties, or to prescribe the conditions of their remaining in the

United States. *Ekiu v. United States,* 142 U.S. 651; *Harisiades v. Shaughnessy,* 342 U.S. 580. "Entry" expresses the relationship of the constitutional power to expel to subjects of deportation procedure. It is constitutionally necessary that before the power to expel can be exercised, the power to exclude must have existed. In this case, since petitioner came to the United States as a non-excludable national, he cannot be expelled, never having been subject to exclusion.

2. In any event petitioner is not now an alien, but a national. Congress has never expressly divested continuously resident Filipinos who owed permanent allegiance to the United States and who arrived as nationals of their status. Such an important forfeiture of status should not be implied. *Washington Pub. Co. v. Pearson,* 306 U.S. 30, 41. Especially where deportation is involved, doubt or ambiguity should be resolved against a determination of status which would result in deportability. *Fong Haw Tan v. Phelan,* 333 U.S. 6, 10.

I.

"Entry" into the United States Is a Precondition to Deportability Under the Act of February 18, 1931. Petitioner Did Not "Enter the United States" and Is Not Deportable.

This court decided in *Barber v. Gonzales,* 347 U.S. 637, that a Filipino who came to the United States in 1930, prior to the passage of the Philippine Independence Act of 1934, did not "enter" the United States as that term is used in Section 19(a) of the Immigration Act of February 5, 1917, as amended.[2] Gonzales was not

[2] 39 Stat. 889, as amended; formerly 8 U.S.C., 155(a); set forth in Appendix, pages 26 to 28.

deportable because of convictions for crimes involving moral turpitude "committed at any time after entry." The present case arises under the Act of February 18, 1931, as amended, 46 Stat. 1171, formerly 8 U.S.C. 156a. If "entry" as that term is used in the 1917 Act is a precondition to deportation under the 1931 Act, then *Barber* is directly applicable, and petitioner in this case is not deportable. It is petitioner's position that both the expressed language and the legislative history of the 1931 Act and its amendment require "entry" as a precondition of deportation in this case to the same extent as in *Barber*.

A. The language of the Act of February 18, 1931, referring to Sections 19 and 20 of the Act of February 5, 1917, necessarily incorporates "entry into the United States" as a precondition of deportability under the 1931 Act.

After its amendment by Sec. 21 of the Alien Registration Act of June 28, 1940, the statute here involved, 8 U.S.C. 156a, read as follows:

> "Any alien (except an addict who is not a dealer in, or a peddler of, any of the narcotic drugs mentioned in this section) who, after February 18, 1931, shall be convicted for violation or conspiracy to violate any statute of the United States or of any state, territory, possession, or of the District of Columbia, taxing, prohibiting, or regulating the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, or any salt, derivative, or preparation of opium or coca leaves, shall be taken into

custody and deported in the manner provided in sections 155 and 156 of this title."

In determining what was intended by this language of reference to these sections, 19 and 20 of the 1917 Act, each of the sections referred to will be separately considered.

Section 19 of the Act of February 5, 1917 (Former 8 U.S.C. 155(a)

Until the passage of the 1952 Immigration and Nationality Act, Section 19 of the 1917 Immigration Act was the basic law relative to deportation.[3] Section 19 first defined twelve classes of deportable aliens: Members of excluded classes on entry; those who entered or shall be found in the United States in violation of the act; anarchists and similar classes; public charges within five years after entry; those convicted of an infamous crime, involving moral turpitude, within five years after entry; those twice convicted of such a crime at any time after entry; those connected with prostitution; those importing or attempting to import persons for immoral purposes; those excluded or deported for connection with prostitution who shall re-enter; those convicted and imprisoned for violation of section 4 of the act (forbidding importation of aliens for purposes of prostitution); those convicted or admitting conviction of a crime involving moral turpitude prior to entry; those entering without inspection. This enumeration of deportable classes is followed by language which is for the most part applicable to all classes of deportable aliens.

[3] See "Hearing before a subcommittee of the Committee on the Judiciary on H.R. 5138," 76 Cong., 3rd Sess., May 17, 1940, page 25, 32.

As here pertinent, the general language of section 19 applicable to all classes provided that any alien falling within the classes described

> "... shall, upon warrant of the Attorney General[4] be taken into custody and deported: *Provided*, ... *further*, That the provisions of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to the representative of the State, make a recommendation to the Attorney General that such alien shall not be deported in pursuance of this Act; nor shall any alien convicted as aforesaid be deported until after the termination of his imprisonment: *Provided, further*, That the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned irrespective of the time of their entry into the United States: *Provided, further*, That the provisions of this section shall also apply to the cases of aliens who come to the mainland of the United States from the insular possessions thereof. . . . In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Attorney General shall be final."[5]

The reference in the 1931 Act to section 19 of the

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[4] The Secretary of Labor prior to June 14, 1940: Reorg. Plan No. V, 5 Fed. Reg. 2423, 54 Stat. 1238.

[5] 39 Stat. 889, 890. The full text of this section is set forth in the Appendix, pages 26 to 30.

1917 Act can be understood only by the assumption that the general provisions following the description of deportable classes of aliens are intended to be applicable, where pertinent, to the 1931 Act, and that the later act is in effect an amendment to section 19, adding thereto a new class of deportable aliens: those convicted of traffic in narcotics.

The legislative history of the 1931 Act fully supports this assumption. It was introduced in 71st Congress as "A Bill (H.R. 3394) to Amend Section 19 of the Immigration Act of 1917 by providing for the deportation of an alien convicted in violation of the Harrison Narcotic Law and amendments thereto" and was passed by the House under this title. 71st Cong., 2nd Sess., Cong. Rec., 12453. The Senate, at the time of passage of this bill, likewise considered it as a bill "to amend Section 19 of the Immigration Act of 1917." 71st Cong., 3rd Sess., Cong. Rec. 4486, 4487. However, the Committee on Immigration, to which the bill was referred, possibly because the language was not strictly amendatory, corrected the title to read: "An Act to Provide for the deportation of aliens convicted and sentenced for violation of any law regulating traffic in narcotics." (71st Cong., 3rd Sess., Sen. Rep. 1443). While the bill was amended both in the House and in the Senate (71st Cong., 3rd Sess., 3741, 4486), the amendments were minor and technical, and the bill was enacted into the law substantially in the form in which it was first introduced.

The 1931 Act paralleled an earlier statute, also providing for deportation of narcotics offenders convicted

under the Jones-Miller Act of February 9, 1909.[6] This statute, the Act of May 26, 1922,[7] amending the Jones-Miller Act, provided as follows:

> "* * * (e) Any alien who at any time after his entry is convicted under subdivision (c) shall, upon the termination of the imprisonment imposed by the court upon such conviction and upon warrant issued by the Secretary of Labor, be taken into custody and deported in accordance with the provisions of Section 19 and 20 of the Act of February 5, 1917, entitled 'An Act to Regulate the Immigration of Aliens to and Residence in, the United States,' or provisions of law hereafter enacted, which are amendatory of, or in substitution for, said sections."

The reference to section 19 of the Immigration Act of 1917 in the Jones-Miller Act amendment of May 26, 1922, was held to adopt "the whole of the provisions relative to deportation contained in those sections," *Hampton v. Wong Ging* (C.A. 9, 1924) 299 Fed. 289; *Weedin v. Moy Fat* (C.A. 9, 1925) 8 F.2d 488; *United States v. Wing* (D.C., Nev., 1925) 6 F.2d 896, except where the particular language of the Jones-Miller Act clearly controlled the general language of the basic Immigration Act. *United States ex rel. Grimaldi v. Ebey* (C.A. 7, 1926) 12 F.2d 922; *Chung Que Fong v. Nagle* (C.A. 9, 1926) 15 F.2d 789; *United States ex rel. Spataro v. Day* (C.A. 2, 1928) 23 F.2d 1005; *Todaro v. Munster* (C.A. 10, 1933) 62 F.2d 963; *Shibata v. Tillinghast* (D.C., Mass., 1929) 31 F.2d 801.

The judicial interpretation of the words of reference

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[6] 35 Stat. 614.

[7] 42 Stat. 596; 21 U.S.C. 175 (1940 Ed.).

to sections 19 and 20 contained in section 2(e) of the Jones-Miller Act was followed in interpreting the Act of February 18, 1931, *Dang Nam v. Bryan* (C.A. 9, 1934) 74 F.2d 379. Discussing the words of reference in the 1922 Act as compared to those of the 1931 Act, the court in the *Dang Nam* case stated:

> "We do not think that this slight change in language indicates an intention to ignore the provisions of section 155 which we had theretofore held applied to such deportation. We see no reason for holding in the case of the Act of May 26, 1922 (21 USCA §175), that the words 'deported in accordance with' the provisions of section 155 with reference to the sentence and recommendation of the trial judge and for holding that such sentence and recommendation was no part of the 'manner' of deportation under the Act of February 18, 1931."

The court held that the recommendation of the trial judge against deportation, in accordance with the pertinent proviso of section 19 of the Immigration Act of 1917, was an effective bar to the deportation of an alien under the 1931 Act.[8]

Thus, according to contemporary judicial interpretation, the language of both the Jones-Miller Act amendment of 1922 and of the 1931 Act by referring to deportation "in accordance with" or "in the manner of" section 19 evidenced a Congressional intent to adopt the general language of section 19 as an integral part of the statutes referring to that section. As the Ninth Circuit Court in *Weedin v. Moy Fat*, 8 F.2d 488, discussing the

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[8] *Contra*: *United States ex rel. Magri v. Wixon* (S.D., N.Y., 1931) 53 F.2d 475.

1922 Act with reasoning equally applicable to the 1931 Act, commented at page 489:

> "Section 19 contains no provision whatever concerning procedure or the manner of deportation. If it was the intention of the latter Act to adopt only the manner of deportation prescribed in the Act of 1917, there was no occasion to refer to Section 19."

Presumably Congress was aware of the interpretation which had been placed upon the language of reference to sections 19 and 20 in the Jones-Miller Act amendment of 1922 in adopting similar language referring to these sections in the 1931 Act, and was also aware of the interpretation placed on the language of reference in the 1931 Act when that act was amended without any change in the words referring to sections 19 and 20 by the Alien Registration Act of 1940[9] (*Cf. Blake v. McKim*, 103 U.S. 336, 339).

The third general proviso of section 19, immediately following the proviso relating to a court's recommendation against deportation, contains language applicable to all classes of aliens to which section 19 is applicable, in terms of "their entry into the United States," as follows:

> " . . . the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens mentioned irrespective of the time of their *entry into the United States*. . . ." (Emphasis added).

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[9] After the amendment of the 1931 Act by section 21 of the Alien Registration Act (54 Stat. 673) the lower federal courts continued to interpret the words of reference as embracing the general provisions of 1917 Act to the 1931 Act. *Ex parte Robles-Rubio* (N.D., Cal., S.D., 1954) 119 F.Supp. 610. See *United States ex rel. DeLuca v. O'Rourke* (C.A. 8, 1954) 213 F.2d 759; *Ex parte Eng* (N.D., Cal., S.D., 1948) 77 F. Supp. 74.

If this, as well as the preceding proviso, which was the subject of the numerous court decisions cited, is generally applicable to the Act of February 18, 1931, then "entry" is as much a precondition to the deportability of petitioner Rabang as it was to respondent Gonzales in *Barber*.

Section 20 of the Act of February 5, 1917
(Former 8 U.S.C. 156)

Section 20 of the Immigration Act of 1917 deals exclusively with the *manner of deportation*. It is thus directly apposite to the 1931 Act, which provides for deportation "in the manner provided in sections 19 and 20." Each part of section 20 makes *entry*, as defined in *Barber v. Gonzales*, 347 U.S. 637, unmistakably a precondition to deportation. The first sentence of the section, in three clauses, relates to the places to which deportation may be effected:

> "That the deportation of aliens provided for in this Act, shall, at the option of the Secretary of Labor, be to the country whence they came or to the foreign port at which such aliens embarked for the United States; or, if such embarkation was for foreign contiguous territory, to the foreign port at which they embarked for such territory; or, if such aliens entered foreign contiguous territory from the United States and later entered the United States, or if such aliens are held by the country from which they entered the United States not to be subjects or citizens of such country, and such country refused to permit their reentry, or imposes any condition upon permitting reentry, then to the country of which such aliens are subjects or citizens, or to the country in which they resided prior

to entering the country from which they entered the United States."

The words "entered the United States" are used in three separate places in this sentence.

The second and third sentences of the section embrace all classes of aliens to whom the section is applicable:

> "If deportation proceedings are instituted at any time *within five years after the entry of alien,* such deportation . . . shall be at the expense of the contractor . . ." etc.
>
> * * * * * * * *
>
> "If deportation proceedings are instituted later than five years *after the entry of the alien,* or, if the deportation is made by reason of causes arising *subsequent to entry,* the cost thereof shall be payable from the appropriation for the enforcement of this Act. . . ." (Emphasis added)

These sentences embrace all of the classes of aliens to whom the section is applicable: those as to whom "deportation proceedings are instituted at any time within five years after entry" and those as to whom "deportation proceedings are instituted later than five years after entry." No sentence of the section is applicable to any other class of aliens. All aliens to whom the section applies are embraced in a single class: Aliens as to whom "*deportation proceedings are instituted . . . after entry.*"

Section 20, even more clearly than section 19, makes plain that Filipinos who commenced their residence in the United States prior to 1934, and who never "entered the United States," but who came as nationals,

cannot be deported "in the manner provided in sections 19 and 20." Thus, "entry" is as much a precondition to deportation under the 1931 Act as it is under section 19 of the 1917 Act and for precisely the same reason. The general portions of section 19, and all of the provisions of section 20, are parts of the 1931 Act without which that Act would be unenforceable. Entry is a precondition of deportation both in sections 19 and 20 of 1917 Act, and is thus a precondition under the Act of February 18, 1931, as amended.

B. "Entry into the United States" is a necessarily implied precondition to deportability regardless of whether the term "entry" is used in the applicable deportation statute.

If the court decides that the express words of reference to sections 19 and 20 of the Immigration Act of 1917 import into the 1931 Act the term "entry," it need go no further. But even if the court should decide that the 1931 Act does not so do, "entry" is a necessarily implied precondition.

"Entry" as defined in *Barber v. Gonzales,* 347 U.S. 637, *Delgadillo v. Carmichael,* 332 U.S. 388, *Carmichael v. Delaney* (C.A. 9, 1948) 170 F.2d 239, *Del Guercio v. Gabot* (C.A. 9, 1947) 161 F.2d 559, and *DiPasquale v. Karnuth* (C.A. 2, 1947) 158 F. 2d 878, is more than a term of art used in a statute. It expresses the relationship of an individual, subject to expulsion, to the source of power to deport which derives from the Constitution. The *implied* power to deport is related to express grants of power from the Constitution to branches of the United States govern-

ment through the term "entry" — the coming of an alien from a foreign place or country into the United States. "Entry" relates this implied power to deport to express constitutional provisions relating to the conduct of foreign affairs, and to the regulation of commerce with foreign nations, within the limitation of the Tenth Amendment. The power of Congress to legislate with respect to immigration, exclusion and expulsion, and the power of the executive to exclude and expel, must be implied from express provisions of Articles I and II of the Constitution if the Tenth Amendment is to be given effect.

It has long been held that such power is implied from the express power of Congress "to regulate commerce with foreign nations," from the treaty-making power of the executive, and from the sovereign power of the United States government to conduct foreign relations. *Ekiu v. United States,* 142 U.S. 651, 659. Subjects of foreign nations coming to the United States may be excluded or admitted conditionally, and after gaining entry may be expelled. The right to expel or deport aliens "rests upon the same grounds . . . as the right to prohibit and prevent their entrance into the country." *Fong Yue Ting v. United States,* 149 U.S. 698, 707. In the same case at page 713 the court stated: "The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power."

Conversely it would seem that, absent the power to exclude, the foundation, source and reason of the power

to expel would be gone. In other words, the power to expel is derived from express grants of power to the legislative and executive branches of the government to conduct foreign affairs in Articles I and II of the Constitution.

While it may be appropriate to express any power granted to the executive and legislative branches of the government by the Constitution in terms of "sovereignty," the statement that the power to deport derives from the "sovereignty" of the United States in its conduct of foreign affairs, tends to obscure rather than clarify the constitutional source of the power. Such broad assertions with respect to the existence of unexpressed, extra-constitutional sovereign power have troubled some members of the court from the earliest deportation cases to some of the latest.[10] In any event, ample power to deport may be implied from express delegation of power to the Congress and the executive under Articles I and II of the Constitution and still give the limitation of the Tenth Amendment full force.

It is not the purpose of petitioner to consider the "whole volume" of judicial history which sustains the power to expel aliens who could have been excluded in the first instance. *Cf. Galvan v. Press*, 347 U.S. 522. But an entirely different problem is presented in this case where petitioner was a national of the United States by birth, and came to, and remained in, the United States as a national. His attempted deportation has nothing to do with the regulation of commerce with for-

[10] See dissenting opinion of Mr. Justice Brewer in *Fong Yue Ting v. United States*, 149 U.S. 698, 732, and of Mr. Justice Douglas in *Harisiades v. United States*, 342 U.S. 580, 598.

eign nations, nor the conduct of foreign affairs. His coming to the United States was a domestic affair. Neither the power to exclude him in the first instance, nor to deport at the present time, can be implied from express grants of power to the Congress or the executive.

There is no instance known to petitioner in which Congress has shown disposition to provide for the banishment or expulsion of persons who never "entered" the United States, and who thus were never subject to the power of exclusion. Congressional views as to the constitutional source of power to expel and exclude aliens have paralleled those of this court:

> "The power of Congress to control immigration stems from the sovereign authority of the United States as a nation and from the constitutional power of Congress to regulate commerce with foreign nations. Every sovereign nation has power, inherent in sovereignty and essential to self preservation, to forbid entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. Congress may exclude aliens altogether or prescribe terms and conditions upon which they may come into or remain in this country." House Rep. 1513, 82nd Cong., 2nd Sess., page 5.

There is nothing known to petitioner that indicates that the Congress has ever considered that it has the power to expel except as a concomitant of the power to exclude, deriving from the same source.[11]

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[11] Although the Immigration and Nationality Act of June 28, 1952, as amended by the Act of September 3, 1954, 68 Stat. 1146, 8 U.S.C.A. § 1481 (a) (8) and (9), provides for divestiture of nationality by reason of conviction of certain offenses, including desertion, treason,

Since the power to expel arises out of the power to exclude initially, it is difficult to see how such power could exist independent of the power to exclude. It is believed that this constitutes a limitation on the power to deport which prevents lawful expulsion of persons other than those who came into the United States from a foreign country.[12]

Whether or not Congress has the power to divest native-born citizens or nationals of their nationality against their will, constitutional authority for the power to expel in such cases is not believed to exist. "Entry" expresses the relationship between alienage and coming into the United States from a foreign country which is the constitutional precondition to deportation. It is believed to be a necessarily implied condition of all statutes providing for the expulsion of aliens. While it seems certain that Congress expressly included entry as a precondition to deportation under the Act of February 18, 1931, absent such express provision, entry would be an implied constitutional limitation upon the power to deport under that or any other statute.

II.

Petitioner Is at the Present Time a National of the United States and Hence Not Deportable as an Alien.

Petitioner, as one born in the Philippines after the

[12] *Eichenlaub v. Shaughnessy*, 338 U.S. 521, is not an exception. After Eichenlaub was denaturalized he stood on the same footing as any other alien who had come to the United States from a foreign country at the time of his initial entry.

and violation and conspiracy to violate the Smith Act, there appears to be no legislation authorizing expulsion of native born citizens or nationals so convicted.

acquisition of those islands by the United States, was a national by birth. He came to, and continued his residence in the United States as a national. He has claimed American nationality ever since (R. 19).

Expatriation is a voluntary act by which an individual divests himself of his nationality, whether originally acquired by birth or naturalization. *Perkins v. Elg*, 307 U.S. 325, 334. No such abandonment or renunciation has taken place in this case. On the contrary, petitioner has clung to his United States nationality, maintaining his residence in the United States, and continuing to assert his claim of nationality.

Nationality acquired by birth is closely analogous to citizenship. It is not analogous to alienage, whose peculiar characteristic is birth outside of the jurisdiction of the United States. *Low Wah Suey v. Backus*, 225 U.S. 460, 463. Petitioner was born under the jurisdiction of the United States, one of the two indicia of citizenship under the Fourteenth Amendment, and within United States territory. By reason of his birth within United States territory, he owed permanent allegiance to the United States at birth. *Gonzales v. Williams*, 192 U.S. 1; *Fourteen Diamond Rings v. United States*, 183 U.S. 176, 179; *Toyota v. United States*, 268 U.S. 402, 410.

The definition of "national" of the Nationality Act of 1940,[13] was applicable to petition. National is there defined as:

> " . . . (1) A citizen of the United States, or (2) a person who though not a citizen of the United

[13] 54 Stat. 1137, former 8 U.S.C. 501 (b).

States owes permanent allegiance to the United States. It does not include an alien."

The same definition is continued in the Immigration and Nationality Act of 1952, section 101 (a) (22), 8 U.S.C.A. 1101 (a) (22), which defines an alien as "Any person not a citizen or national of the United States" (Section 101 (a) (3); 8 U.S.C.A. 1101 (a) (3)).

With respect to citizenship, which derives from the Constitution, " . . . no act or omission of Congress . . . can affect citizenship acquired as a birthright, by virtue of the Constitution itself, without any aid of legislation. The Fourteenth Amendment . . . has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution itself to constitute a sufficient and complete right to citizenship." *United States v. Wong Kim Ark,* 169 U.S. 649, 703.

While nationality, acquired at birth by virtue of treaty and statute may rest upon a somewhat different footing, the close relationship between citizenship and nationality, and their substantial divergence from the status of alienage, indicates that divestiture of nationality is not to be inferred from doubtful or uncertain language, but should rest upon the most explicit expression of legislative intent. Just as the right of citizenship should not be "destroyed by an ambiguity," *Perkins v. Elg,* 307 U.S. 325, 337, neither should nationality be taken away by inference or assumption.

While the court below has stated in several cases[14] that Filipinos born in the Philippine Islands, and com-

[14] *Cabebe v. Atcheson* (C.A. 9, 1950) 183 F.2d 795; *Mangaoang v. Boyd* (1953) 205 F.2d 553; *Gonzales v. Barber* (1953) 207 F.2d 398; *Resureccion-Talavera v. Barber* (C.A. 9, 1956) 231 F.2d 534, and this case below.

ing to the United States prior to the passage of the Independence Act of 1934, lost their United States nationality by operation of law on July 4, 1946, admittedly such conclusion rests upon an inference. As stated in *Cabebe v. Acheson*, 183 F.2d 795, at page 801:

> "The question is not directly answered (but, as we think, it was inferentially answered) by the Philippine Independence Act of 1934, the presidential proclamation of Philippine independence or the Treaty of July 4, 1946, with the Republic of the Philippines. While there is no special reference of inclusion or exclusion in any of these acts to Filipinos who were no longer residing in the Islands on the date of their independence, it was, from the ceding from Spain, contemplated and finally accomplished that the United States would surrender all sovereignty 'over the territory and the people of the Philippines.' In the light of the undeviating non-imperialistic policy of the government of the United States, it seems to us that the expression 'people of the Philippines' is all-inclusive excepting only those who have by their own volition taken authorized steps to separate themselves from a national relation to the government of the Philippines. All of the Congressional acts are consistent with this interpretation."

But divestiture of the cherished status of nationality should not be inferred from the failure of carefully drawn acts and proclamations to make reference to the substantial, though relatively small, number of Filipinos who came here as United States nationals, have resided in the United States for twenty-three years or more, and have become a part of the national life of this country. Forfeitures should never be presumed, but should rest only upon the most clearly expressed intent.

Washington Publishing Co. v. Pearson, 306 U.S. 30, 41; *United States v. One Ford Coach*, 307 U.S. 219, 226; *Knickerbocker Life Ins. Co. v. Norton*, 96 U.S. 234; *Bennett v. Hunter*, 76 U.S. 326.

Particularly where loss of the status of nationality may result in deportation, construction of the Independence Act should be resolved in favor of maintenance of the status which would prevent expulsion. As this court said in *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10:

> "We resolve the doubts in favor of that construction because deportation is a drastic measure and at times equivalent to banishment or exile. . . . It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. . . . [S]ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."

In this case not only deportation, and possible permanent separation from loved ones is at stake, but, indeed, the birthright of American nationality.

CONCLUSION

For the foregoing reasons the decision of the court below should be reversed, the order of deportation set aside, and petitioner should be released from further custody.

Respectfully submitted,

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APPENDIX

1.

Act of Feb. 18, 1931, 46 Stat. 1171:

AN ACT to Provide for the Deportation of Aliens Convicted and Sentenced for Violation of Any Law Regulating Traffic in Narcotics.

Be It Enacted by the Senate and House of Representatives in Congress Assembled, That any alien (except an addict who is not a dealer in, or peddler of, any of the narcotic drugs mentioned in this Act) who, after the enactment of this Act, shall be convicted and sentenced for violation or conspiracy to violate any statute of the United States taxing, prohibiting, or regulating the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation of opium, coca leaves, heroin, or any salt, derivative, or preparation of opium or coca leaves, shall be taken into custody and deported in the manner provided in sections 19 and 20 of the Act of February 5, 1917, entitled "An Act to regulate the immigration of aliens to, and the residence of aliens in, the United States."

Act of June 28, 1940, 54 Stat. 673:

SEC. 21. The Act entitled "An Act to provide for the deportation of aliens convicted and sentenced for violation of any law regulating traffic in narcotics," approved February 18, 1931, is amended—

(1) By striking out the words "and sentenced";

(2) By inserting after the words "any statute of the United States" the following "or of any state, territory, possession, or of the District of Columbia;" and

(3) By inserting after the word "heroin" a comma and the word "marihuana."

2.

Act of Feb. 5, 1917, 39 Stat. 889-891:

SEC. 19. That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States; any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy, or the overthrow by force or violence of the Government of the United States or of all forms of law or the assassination of public officials; any alien who within five years after entry becomes a public charge from causes not affirmatively shown to have arisen subsequent to landing; except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry; any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute; any alien who manages or is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists any prostitute or protects or promises to protect from arrest any prostitute; any alien who shall import

or attempt to import any person for the purpose of prostitution or for any other immoral purpose; any alien who, after being excluded and deported or arrested and deported as a prostitute, or as a procurer, or as having been connected with the business of prostitution or importation for prostitution or other immoral purposes in any of the ways hereinbefore specified, shall return to and enter the United States; any alien convicted and imprisoned for a violation of any of the provisions of section four hereof; any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude; at any time within three years after entry, any alien who shall have entered the United States by water at any time or place other than as designated by immigration officials, or by land at any place other than one designated as a port of entry for aliens by the Commissioner General of Immigration, or at any time not designated by immigration officials, or who enters without inspection, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported: *Provided*, That the marriage to an American citizen of a female of the sexually immoral classes the exclusion or deportation of which is prescribed by this Act shall not invest such female with United States citizenship if the marriage of such alien female shall be solemnized after her arrest or after the commission of acts which make her liable to deportation under this Act: *Provided further*, That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the Court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing or passing sentence or within thirty days thereafter, due notice having first been given to repre-

sentatives of the State, make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this Act; nor shall any alien convicted as aforesaid be deported until after the termination of his imprisonment: *Provided further*, That the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned irrespective of the time of their entry into the United States: *Provided further*, That the provisions of this section shall also apply to the cases of aliens who come to the mainland of the United States from the insular possessions thereof; *Provided further*, That any person who shall be arrested under the provisions of this section, on the ground that he has entered or been found in the United States in violation of any other law thereof which imposes on such person the burden of proving his right to enter or remain, and who shall fail to establish the existence of the right claimed, shall be deported to the place specified in such other law. In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Secretary of Labor shall be final.

SEC. 20. That the deportation of aliens provided for in this Act shall, at the option of the Secretary of Labor, be to the country whence they came or to the foreign port at which such aliens embarked for the United States; or, if such embarkation was for foreign contiguous territory, to the foreign port at which they embarked for such territory; or, if such aliens entered foreign contiguous territory from the United States and later entered the United States, or if such aliens are held by the country from which they entered the United States not to be subjects or citizens of such country, and such country refuses to permit their reentry, or imposes any condition upon permitting reentry, then

to the country of which such aliens are subjects or citizens, or to the country in which they resided prior to entering the country from which they entered the United States. If deportation proceedings are instituted at any time within five years after the entry of the alien, such deportation, including one-half of the entire cost of removal to the port of deportation, shall be at the expense of the contractor, procurer, or other person by whom the alien was unlawfully induced to enter the United States, or, if that can not be done, then the cost of removal to the port of deportation shall be at the expense of the appropriation for the enforcement of this Act, and the deportation from such port shall be at the expense of the owner or owners of such vessels or transportation line by which such aliens respectively came, or, if that is not practicable, at the expense of the appropriation for the enforcement of this Act. If deportation proceedings are instituted later than five years after the entry of the alien, or, if the deportation is made by reason of causes arising subsequent to entry, the cost thereof shall be payable from the appropriation for the enforcement of this Act. A failure or refusal on the part of the masters, agents, owners, or consignees of vessels to comply with the order of the Secretary of Labor to take on board, guard safely, and transport to the destination specified any alien ordered to be deported under the provisions of this Act shall be punished by the imposition of the penalties prescribed in section eighteen of this Act: *Provided*, That when in the opinion of the Secretary of Labor the mental or physical condition of such alien is such as to require personal care and attendance, the said Secretary shall when necessary employ a suitable person for that purpose, who shall accompany such alien to his or her final destination, and the expense incident to such service shall be defrayed in the same manner as the expense of de-

porting the accompanied alien is defrayed. Pending the final disposal of the case of any alien so taken into custody, he may be released under a bond in the penalty of not less than $500 with security approved by the Secretary of Labor, conditioned that such alien shall be produced when required for a hearing or hearings in regard to the charge upon which he has been taken into custody, and for deportation if he shall be found to be unlawfully within the United States.

The Philippine Independence Act of March 24, 1934, 48 Stat. 456, former 48 U.S.C. 1232, 1238 and 1244.

Sec. 2(a). The constitution formulated and drafted shall be Republican in form, shall contain a bill of rights, and shall, either as a part thereof or in an ordinance appended thereto, contain provisions to the effect that, pending the final and complete withdrawal of the sovereignty of the United States over the Philippine Islands—

(1) All citizens of the Philippine Islands shall owe allegiance to the United States. . . .

Sec. 8(a). Effective upon the acceptance of this Act by concurrent resolution of the Philippine Legislature or by a convention called for that purpose, as provided in Section 17.

(1) For the purposes of the Immigration Act of 1917, the Immigration Act of 1924 (except section 13 (c)), this section, and all other laws of the United States, relating to the immigration, exclusion, or expulsion of aliens, citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens. For such purposes the Philippine Islands shall be considered as a separate country and shall have for each fiscal year a quota of fifty. . . .

Sec. 14. Upon the final and complete withdrawal of American sovereignty over the Philippine Islands the immigration laws of the United States . . . shall apply to persons who were born in the Philippine Islands to the same extent as in the case of other foreign countries.

* * *

Act of August 7, 1939, 53 Stat. 1230, former 48 U.S.C. 1238, * * * Sec. 2—Sec. 8 of the said Act of March 24, 1934, is hereby amended by adding thereto a new subsection as follows:

(d) Pending the final and complete withdrawal of the sovereignty of the United States over the Philippine Islands, except as otherwise provided by this Act, citizens and corporations of the Philippines shall enjoy in the United States all of the rights and privileges which they respectively shall have enjoyed therein under the laws of the United States in force at the time of the inauguration of the Government of the Commonwealth of the Philippine Islands.